

STATE OF CALIFORNIA

OFFICE OF ADMINISTRATIVE LAW

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In re: Request for Regulatory) 1993 OAL Determination No. 4
Determination filed by ROBERT D.)
MILLER, CAP Advocate, Concerning) [Docket No. 90-019]
DEPARTMENT OF REHABILITATION)
Memorandum dated May 14,) April 9, 1993
1990, re "Equipment Freeze-)
General Fund Expenditures"¹)
) Determination Pursuant to
) Government Code Section 11347.5;
) Title 1, California Code of
) Regulations,
) Chapter 1, Article 3

Determination by: JOHN D. SMITH, Deputy Director

Herbert F. Bolz, Supervising Attorney
Barbara Steinhardt-Carter, Staff Counsel
Regulatory Determinations Program

SYNOPSIS

The Office of Administrative Law must decide whether the Memorandum the Department of Rehabilitation issued on May 14, 1990, contains policies which are "regulations" and therefore without legal effect unless the Department adopts them in compliance with the Administrative Procedure Act ("APA").

The Office of Administrative Law concludes that the policies in the May 14, 1990, Memorandum are not "regulations" required to be adopted in accordance with the requirements of the APA.

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THE ISSUE PRESENTED ²

Robert D. Miller has requested the Office of Administrative Law ("OAL") to determine³ whether or not the Department of Rehabilitation ("Department") Memorandum on preparing purchase orders for client and business enterprise program equipment contains policies which are "regulations" required to be adopted pursuant to the APA.⁴

THE DECISION ^{5, 6, 7, 8}

OAL finds that:

- (1) the Department's quasi-legislative enactments are generally subject to the APA;
- (2) the challenged rule is not a "regulation" as defined in the key provision of Government Code section 11342, subdivision (b);
- (3) even if one interpreted the Memorandum as a "regulation," the internal management exception to the APA requirements would apply;
- (4) the challenged rule does not violate Government Code section 11347.5, subdivision (a).⁹

REASONS FOR DECISION

I. APA; RULEMAKING AGENCY; AUTHORITY; BACKGROUND

The APA and Regulatory Determinations

In Grier v. Kizer, the California Court of Appeal described the APA and OAL's role in that Act's enforcement as follows:

"The APA was enacted to establish basic minimum procedural requirements for the adoption, amendment or repeal of administrative regulations promulgated by the State's many administrative agencies. (Stats. 1947, ch. 1425, secs. 1, 11, pp. 2985, 2988; former Gov. Code section 11420, see now sec. 11346.) . . . The APA requires an agency, inter alia, to give notice of the proposed adoption, amendment, or repeal of a regulation (section 11346.4), to issue a statement of the specific purpose of the proposed action (section 11346.7), and to afford interested persons the opportunity to present comments on the proposed action (section 11346.8). Unless the agency promulgates a regulation in substantial compliance with the APA, the regulation is without legal effect. (Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 204, 149 Cal.Rptr. 1, 583 P.2d 744).

"In 1979, the Legislature established the OAL and charged it with the orderly review of administrative regulations. In so doing, the Legislature cited an unprecedented growth in the number of administrative regulations being adopted by state agencies as well as the lack of a central office with the power and duty to review

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regulations to ensure they are written in a comprehensible manner, are authorized by statute and are consistent with other law. (Sections 11340, 11340.1, 11340.2)." [Footnote omitted; emphasis added.]¹⁰

In 1982, recognizing that state agencies were for various reasons bypassing OAL review (and other APA requirements), the Legislature enacted Government Code section 11347.5. Section 11347.5, in broad terms, prohibits state agencies from issuing, utilizing, enforcing or attempting to enforce agency rules which should have been, but were not, adopted pursuant to the APA. This section also provides OAL with the authority to issue a regulatory determination as to whether a challenged state agency rule is a "regulation" as defined in subdivision (b) of Government Code section 11342.

The Rulemaking Agency Named in this Proceeding

The State Department of Rehabilitation ("Department"), one of ten departments currently located in the Health and Welfare Agency, was created in 1969. The California Welfare and Institutions Code¹¹ contains the Department's enabling act which provides, in relevant part:

The Legislature created the Department " . . . to assist and encourage handicapped individuals to attain their maximum usefulness and self-sufficiency and make adequate provision for such services as will enable them to prepare for and engage in gainful employment in order that they may make their full contribution to society" ¹² The Legislature found that this policy "should be carried out by strengthening the existing program of vocational rehabilitation, consolidating the basic rehabilitative services in a Department of Rehabilitation . . . [and] strengthening and developing services where needed" ¹³ Further, in compliance with

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federal requirements,¹⁴ the Legislature designated the Department the sole state agency for administration of the state plan for vocational rehabilitation services, including decisions regarding eligibility and the nature and scope of rehabilitative services.¹⁵

Title 9 of the California Code of Regulations ("CCR") contains the Department's formally adopted regulations. The Department also uses a "Regulations and Procedures Manual," the "Client Tracking System Handbook," the "Rehabilitation Administrative Manual," the "Habilitation Services Ratesetting Manual,"¹⁶ and "Administrative Directives." Two earlier OAL determinations have addressed the Department's use of policies which appeared regulatory. OAL determined in each case that the policies complained of contained both regulatory and non-regulatory portions. See 1988 OAL Determination No. 7¹⁷ and 1989 OAL Determination No. 13¹⁸ for further information.

Authority¹⁹

Welfare and Institutions Code section 19006 provides:

"The [Department of Rehabilitation] may adopt, amend, or repeal, in accordance with the [APA] such rules and regulations as may be reasonably necessary to enable it to carry out its duties and powers." [Emphasis added.]²⁰

Background: This Request for Determination

On May 21, 1990, Robert D. Miller, an advocate with the Southern California Rehabilitation Services Client Assistance Program (the "Requester"), brought this request for determination. The Requester stated that the Department had "set [...] a new policy which is regulatory

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in nature and is being used to deny clients a specific service simply because the cost of such a service is over \$500.00." He asked that OAL determine that the policy violates Government Code section 11347.5, subdivision (a)(5). The Requester included a copy of the Memorandum the Department issued May 14, 1990, entitled "Equipment Freeze--General Fund Expenditures" (also referred to below as the "challenged rule"). The Memorandum states in full:

"Effective immediately, a freeze has been placed on the purchase of accountable equipment (whether through purchasing delegation or purchase estimate through Office of Procurement) if general funds are used. Accountable equipments [sic] consists of any item which has the following characteristics:

"1. Have a normal useful life of at least four years;

"2. Have a unit acquisition cost of at least \$500 (e.g. four identical assets which cost \$300 each, for a \$1,200 total, would not meet the requirements).

"This will affect client equipment purchases or BEP vending stand equipment purchases over \$500. In order for us to continue necessary services, the following statement will need to be placed on all purchase estimates or on the procurement audit copy of the Control/Delegation Purchase Order (DR 297D) for client purchases or the Std. 65 for BEP purchases:

"This purchase is exempt from Management Memo 90-10 as purchase involves no General Fund expenditures. [Bold in original].

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"In order for the Department to monitor these equipment expenditures, a copy of the Contract/Delegation Order DR 297D must be sent to the Business Services Section in Central Office. It will not be necessary for BEP staff to send a copy of the Std. 65.

"This memo will be in effect for equipment purchases through June 30, 1990. If you have any questions, please call Barbara Money at the above number."

On March 22, 1991, OAL published a summary of this Request for Determination in the California Regulatory Notice Register,²¹ along with a notice inviting public comment. OAL received no public comments. On April 29, 1991, Gwynne T. Pratt, Staff Counsel, submitted the Response to Request for Regulatory Determination ("Response") on behalf of the Department.

II. DISCUSSION

Government Code section 11347.5 governs OAL's response to requests for determinations. Subsection (b) of section 11347.5 states as follows:

"If . . . [OAL] is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which has not been adopted as a regulation and filed with the Secretary of State pursuant to . . . [the APA], . . . [OAL] may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a regulation as defined in subdivision (b) of Section 11342." [Emphasis added.]

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Note that OAL has simply been authorized to determine whether a challenged rule is or is not a "regulation" under the APA. OAL lacks authority either to prevent the use of a rule or policy declared to be an invalid "regulation" in violation of section 11347.5, or to impose penalties upon such use. Likewise, OAL lacks authority to enforce the application of existing regulations properly adopted pursuant to the APA or to require an agency to adopt regulations on specific topics. Such authority rests with the courts.

In this determination, the key issues are:

- (1) WHETHER THE APA GENERALLY APPLIES TO THE DEPARTMENT'S QUASI-LEGISLATIVE ENACTMENTS.
- (2) WHETHER THE CHALLENGED RULE CONSTITUTES A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.
- (3) IF THE CHALLENGED RULE MEETS THE DEFINITION OF A "REGULATION," WHETHER IT FALLS WITHIN AN EXCEPTION TO APA REQUIREMENTS.

FIRST, WE INQUIRE WHETHER THE APA GENERALLY APPLIES TO THE DEPARTMENT'S QUASI-LEGISLATIVE ENACTMENTS.

Government Code section 11000 states in part:

"As used in this title ['Government of the State of California'] 'state agency' includes every state office, officer, department, division, bureau, board, and commission." [Emphasis added.]

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This statutory definition applies to the APA, that is, it helps determine whether or not a particular "state agency" must adhere to the APA rulemaking requirements. Section 11000 is contained in Title 2, Division 3 ("Executive Department"), Part 1 ("State Departments and Agencies"), Chapter 1 ("State Agencies") of the Government Code. The rulemaking portion of the APA is also part of Title 2 of the Government Code: Chapter 3.5 of Part 1 of Division 3.

The APA somewhat narrows the broad definition of "state agency" given in Government Code section 11000. In Government Code section 11342, subdivision (b), the APA provides that the term "state agency" applies to all state agencies, except those in the "judicial or legislative departments."²² Since the Department is not in the judicial or the legislative branch of state government, we conclude that APA rulemaking requirements generally apply to its quasi-legislative enactments.²³

Further, Welfare and Institutions Code section 19006, cited above, expressly requires that the procedural requirements of the APA apply to the Department's quasi-legislative enactments.²⁴

Thus, the APA applies to all state agencies, except those "in the judicial or legislative departments." The Department is in neither the judicial nor the legislative branches of state government. Its enabling statute expressly requires it to comply with the APA when it adopts rules. Therefore, we conclude that the APA rulemaking requirements generally apply to the Department.

SECOND, WE INQUIRE WHETHER THE CHALLENGED RULE CONSTITUTES A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

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In part, Government Code section 11342, subdivision (b), defines "regulation" as:

" . . . every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, . . . " [Emphasis added.]

Government Code section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

"(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a ['regulation'] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]" [Emphasis added.]

In Grier v. Kizer,²⁵ the California Court of Appeal upheld OAL's two-part test as to whether a challenged agency rule is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (b):

First, is the challenged rule either

o a rule or standard of general application or

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- o a modification or supplement to such a rule?

Second, has the challenged rule been adopted by the agency to either

- o implement, interpret, or make specific the law enforced or administered by the agency or
- o govern the agency's procedure?²⁶

If an uncodified rule fails to satisfy either of the above two parts of the test, we must conclude that it is not a "regulation" and not subject to the APA. In applying this two-part test, however, we are mindful of the admonition of the Grier court:

" . . . because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (Armistead, supra, 22 Cal.3d at p. 204, 149 Cal. Rptr. 1, 583 P.2d 744), we are of the view that any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA." [Emphasis added.]²⁷

- A. Is the Challenged Rule a Rule or Standard of General Application or a Modification or Supplement to Such a Rule or Standard?

The answer to the first part of the inquiry is "yes," although in a more limited manner than the Requester has characterized this rule.

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For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.²⁸

The Memorandum sets out a procedural requirement or "rule" meant to apply to all persons who fill out all purchase orders regarding equipment which fits the definition in the Memorandum. In that sense, it is a rule of general application. It does not, however, have the effect which the Requester mistakenly believes it does: i.e., prohibiting the funding of certain services or equipment which other provisions of state and federal law mandate the Department to provide. The challenged rule does have "general application," but only as it applies to the filling out of paperwork in a manner which permits the use of federal funds during the time of a freeze of state general funds for certain items.

B. Part Two - Does the Challenged Rule Interpret, Implement, or Make Specific the Law Which the Agency Enforces or Administers or Which Governs the Agency's Procedure?

The Memorandum does not implement, interpret or make more specific the general mandate to provide specified services to eligible clients, except in a very limited sense. One could argue that, very literally, directing staff to include the required statement that a service is funded by federal funds on each appropriate purchase order implements other statutes and regulations which require the Department to provide specified services.

Analysis under the two-part test leads us to conclude that the challenged rule is arguably, at least in part, a "regulation" within the meaning of the key provision of Government Code section 11342, subdivision (b).

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THIRD, TO THE EXTENT THAT THE CHALLENGED RULE IS A RULE OF GENERAL APPLICATION, WE INQUIRE WHETHER THE CHALLENGED RULE FALLS WITHIN AN EXCEPTION TO THE APA REQUIREMENTS.

In its Response, the Department argues that the challenged rule is not "by definition a regulation but rather an internal administrative directive relating to processing of purchases" and asks OAL to "determine that the memorandum in issue is not a regulation." The Department has combined two arguments together: first, that the Memorandum does not meet the definition of a regulation, discussed above; and secondly, that the Memorandum, if it is a "regulation" by definition, falls within one of the established general exceptions to the APA.²⁹ Assuming that the Memorandum does meet at least the most literal definition of a "regulation," it clearly falls within the "internal management" exception to the APA. Government Code section 11342, subdivision (b), provides:

"(b) "Regulation" means every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, except one which relates only to the internal management of the state agency" [Emphasis added.]

The Memorandum simply instructs the Department's employees on the agreed-upon method to assure that purchase orders fulfilling the Department's statutory duties will go smoothly through the process and not be delayed because of a freeze of state funds, while federal funds are still available to carry out the Department's regulatory and statutory duties.

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Having found the challenged rule to be, at least in part, a "regulation" but exempt from the requirements of the APA, we conclude that the rule does not violate Government Code section 11347.5, subdivision (a).

III. CONCLUSION

For the reasons set forth above, OAL finds that:

- (1) the Department's quasi-legislative enactments are generally required to be adopted pursuant to the APA;
- (2) the challenged rule is, at least in part, a "regulation" as the key provision of Government Code section 11342, subdivision (b), defines that term;
- (3) to the extent that the challenged rule is a "regulation," the internal management exception to the APA requirements applies;

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- (4) the challenged rule does not violate Government Code section 11347.5, subdivision (a).

DATE: April 9, 1993

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1. This Request for Determination was filed by Robert D. Miller, CAP Advocate, San Bernadino/Riverside Districts, Southern California Rehabilitation Services, Client Assistance Program, 459 W. 4th St., Suite #6, San Bernadino, CA 92401-1885. The Department of Rehabilitation was represented by Elizabeth A. Solstad, Chief Counsel, and Gwynne T. Pratt, Staff Counsel, 830 K Street Mall, Room 322, Sacramento, CA 95814, (916) 445-0186.

To facilitate the indexing and compilation of determinations, OAL began, as of January 1, 1989, assigning consecutive page numbers to all determinations issued within each calendar year, e.g., the first page of this determination, as filed with the Secretary of State and as distributed in typewritten format by OAL, is "123" rather than "1." Different page numbers are necessarily assigned when each determination is later published in the California Regulatory Notice Register.

This determination may be cited as "**1993 OAL Determination No. 4** (Department of Rehabilitation)."

2. The legal background of the regulatory determination process--including a survey of governing case law--is discussed at length in note 2 to **1986 OAL Determination No. 1** (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16, typewritten version, notes pp. 1-4. See also *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, 249-250, review denied (APA was enacted to establish basic minimum procedural requirements for the adoption, amendment or repeal of state administrative regulations).

In August 1989, a second survey of governing case law was published in **1989 OAL Determination No. 13** (Department of Rehabilitation, August 30, 1989, Docket No. 88-019), California Regulatory Notice Register 89, No. 37-Z, p. 2833, note 2. The second survey included (1) five cases decided after April 1986 and (2) seven pre-1986 cases discovered by OAL after April 1986.

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Persuasive authority was also provided in the form of nine opinions of the California Attorney General which addressed the question of whether certain material was subject to APA rulemaking requirements.

In November 1990, a third survey of governing case law was published in **1990 OAL Determination No. 12** (Department of Finance, November 2, 1990, Docket No. 89-019 [printed as "89-020"]), California Regulatory Notice Register 90, No.46-Z, page 1693, note 2. The third survey included (1) five appellate court cases which were decided during 1989 and 1990, and (2) two California Attorney General opinions: one opinion issued before the enactment of Government Code section 11347.5, and the other opinion issued thereafter.

In January 1992, a fourth survey of governing case law was published in **1992 OAL Determination No. 1** (Department of Corrections, January 13, 1992, Docket No. 90-010), California Regulatory Notice Register 92, No. 4-Z, page 83, note 2. This fourth survey included two cases holding that government personnel rules could not be enforced unless duly adopted.

Authorities discovered since fourth survey

One case and one statute underscore the basic principle that all state agency rules which meet the statutory definition of "regulation" must either be (1) expressly exempted by statute or (2) adopted pursuant to the Administrative Procedure Act and printed in the California Code of Regulations. In *Engelmann v. State Board of Education* (1991) 2 Cal.App.4th 47, 3 Cal.Rptr.2d 264, review denied, the California Court of Appeal, Third District, held that state textbook selection guidelines were "regulations" which had to be adopted in compliance with the APA. In *Engelmann*, the Third District expressly overruled its 1973 decision in *American Friends Service Committee v. Proconier* insofar as the 1973 decision suggested that "specific" provisions in agency enabling acts could be held to control over the "general" APA (Government Code section 11346). In section 11346, the Court noted, there is an express basis for applying the APA to every other statute.

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The second recent development is the legislative response to 1990 OAL Determination No. 12, which concluded that certain rules issued by the Department of Finance violated the APA. In urgency legislation (SB 327/1991), the Legislature expressly exempted such Department of Finance rules from APA rulemaking requirements. See Government Code section 11342.5.

Third, in *State Water Resources Control Board v. Office of Administrative Law (Bay Planning Coalition)* (1993) 12 Cal.App.4th 697, 16 Cal.Rptr.2d 25, rehearing denied, Feb. 19, 1993, the California Court of Appeal upheld **1989 OAL Determination No. 4**, which found that regulatory portions of regional water quality control plans (or "basin plans") were subject to the APA. Fourth, in *Department of Water and Power v. State of California Energy Resources and Conservation Commission* (1991) 2 Cal.App.4th 206, 3 Cal.Rptr.2d 289, 301, the Court found the challenged interpretations inconsistent with the statute, avoiding the APA compliance issue.

Readers aware of additional judicial decisions concerning "underground regulations"--published or unpublished--are invited to furnish OAL's Regulatory Determinations Unit with a citation to the opinion and, if unpublished, a copy of the opinion. (Whenever a case is cited in a regulatory determination, the citation is reflected in the Determinations Index.) Readers are also encouraged to submit citations to Attorney General opinions addressing APA compliance issues.

3. Title 1, California Code of Regulations ("CCR") (formerly known as the "California Administrative Code"), subsection 121(a), provides:

"'Determination' means a finding by OAL as to whether a state agency rule is a 'regulation,' as defined in Government Code section 11342(b), which is invalid and unenforceable unless

- (1) it has been adopted as a regulation and filed with the Secretary of State pursuant to the APA, or,

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(2) it has been exempted by statute from the requirements of the APA." [Emphasis added.]

See Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, review denied (finding that Department of Health Services' audit method was invalid and unenforceable because it was an underground regulation which should be adopted pursuant to the APA); and Planned Parenthood Affiliates of California v. Swoap (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b), yet had not been adopted pursuant to the APA, was "invalid").

4. According to Government Code section 11370:

"Chapter 3.5 (commencing with Section 11340), Chapter 4 (commencing with Section 11370) and Chapter 5 (commencing with Section 11500) constitute and may be cited as, the Administrative procedure Act." (Emphasis added.)

We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11356.

The rulemaking portion of the APA and all OAL regulations are both reprinted and indexed in the annual APA/OAL regulations booklet "**California Rulemaking Law**," which is available from OAL (916-323-6225). The February 1993 revision is \$3.50 (\$5.80 if sent U.S. Mail).

5. OAL Determinations Entitled to Great Weight In Court

The California Court of Appeal has held that a statistical extrapolation rule utilized by the Department of Health Services in Medi-Cal audits must be

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adopted pursuant to the APA. Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244. Prior to this court decision, OAL had been requested to determine whether or not this Medi-Cal audit rule met the definition of "regulation" as found in Government Code section 11342, subdivision (b), and therefore was required to be adopted pursuant to the APA. Pursuant to Government Code section 11347.5, OAL issued a determination concluding that the audit rule did meet the definition of "regulation," and therefore was subject to APA requirements. **1987 OAL Determination No. 10** (Department of Health Services, Docket No. 86-016, August 6, 1987). The Grier court concurred with OAL's conclusion, stating that the

"Review of [the trial court's] decision is a question of law for this court's independent determination, namely, whether the Department's use of an audit method based on probability sampling and statistical extrapolation constitutes a regulation within the meaning of section 11342, subdivision (b). [Citations.]" (219 Cal.App.3d at p. 434, 268 Cal.Rptr. at p. 251.)

Concerning the treatment of **1987 OAL Determination No. 10**, which was submitted to the court for consideration in the case, the court further found:

"While the issue ultimately is one of law for this court, 'the contemporaneous administrative construction of a statute by those charged with its enforcement and interpretation is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized. [Citations.]' [Citations.] [Par.] Because [Government Code] section 11347.5, subdivision (b), charges the OAL with interpreting whether an agency rule is a regulation as defined in [Government Code] section 11342, subdivision (b), we accord its determination due consideration." [Id.; emphasis added.]

The court also ruled that OAL's Determination, that "the audit technique had

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not been duly adopted as a regulation pursuant to the APA, . . . [and therefore] deemed it to be an invalid and unenforceable 'underground' regulation," was "entitled to due deference." [Emphasis added.]

Other reasons for according "due deference" to OAL determinations are discussed in note 5 of **1990 OAL Determination No. 4** (Board of Registration for Professional Engineers and Land Surveyors, February 14, 1990, Docket No. 89-010), California Regulatory Notice Register 90, No. 10-Z, March 9, 1990, p. 384.

6. Note Concerning Comments and Responses

In order to obtain full presentation of contrasting viewpoints, we encourage not only affected rule-making agencies but also all interested parties to submit written comments on pending requests for regulatory determination. (See Title 1, CCR, sections 124 and 125.) The comment submitted by the affected agency is referred to as the "Response."

If the affected agency concludes that part or all of the challenged rule is in fact an "underground regulation," it would be helpful, if circumstances permit, for the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.

7. If an uncodified agency rule is found to violate Government Code section 11347.5, subdivision (a), the rule in question may be validated by formal adoption "as a regulation" Government Code section 11347.5, subd. (b)) or by incorporation in a statutory or constitutional provision. See also California Coastal Commission v. Quanta Investment Corporation (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.) Of course, an agency rule found to violate the APA could also simply be rescinded.

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8. Pursuant to Title 1, CCR, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State. This Determination was filed with the Secretary of State on the date shown on the first page of this Determination.
9. Government Code section 11347.5 provides:
 - "(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a ['regulation'] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.
 - "(b) If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a ['regulation'] as defined in subdivision (b) of Section 11342.
 - "(c) The office shall do all of the following:
 - "1. File its determination upon issuance with the Secretary of State.
 - "2. Make its determination known to the agency, the Governor, and the Legislature.
 - "3. Publish a summary of its determination in the California

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Regulatory Notice Register within 15 days of the date of issuance.

"4. Make its determination available to the public and the courts.

"(d) Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published.

"(e) A determination issued by the office pursuant to this section shall not be considered by a court, or by an administrative agency in an adjudicatory proceeding if all of the following occurs:

"1. The court or administrative agency proceeding involves the party that sought the determination from the office.

"2. The proceeding began prior to the party's request for the office's determination.

"3. At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which is the legal basis for the adjudicatory action is a ['']regulation[''] as defined in subdivision (b) of Section 11342."

[Emphasis added.]

10. Grier v. Kizer, (1990) 219 Cal.App.3d 422, 431, 268 Cal.Rptr. 244, 249, review denied.

11. Sections 19000 through 19856.

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12. Welfare and Institutions Code section 19000.
13. Id.
14. See Welfare and Institutions Code sections 19011 and 19012. On the federal program generally, see Schornstein v. New Jersey Division of Vocational Rehabilitation Services (D.N.J. 1981) 519 F.Supp.773, aff'd. 7/8/82 at 688 F. 2d 824 (holding that federal law mandated state agency to supply interpreter to deaf student).
15. Welfare and Institutions Code section 19005.1.
16. The Department has incorporated the regulatory portions of this manual by reference into section 7337, Title 9, CCR.
17. CRNR 88, No. 22-Z, May 27, 1988, p.1855.
18. CRNR 89, No. 37-Z, September 15, 1989, p. 2833.
19. OAL does not review alleged underground regulations for compliance with APA's six substantive standards

We discuss the affected agency's rulemaking authority (see Gov. Code, sec. 11349, subd. (b)) in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Code of Regulations, OAL will, pursuant to Government Code section 11349.1, subdivision (a), review the proposed regulation in light of the APA's procedural and substantive requirements.

The APA requires all proposed regulations to meet the six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. OAL does not review alleged "underground regulations" to determine whether

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or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

The question of whether the challenged rule would pass muster under the six substantive standards need not be decided until such a regulatory filing is submitted to us under Government Code section 11349.1, subdivision (a). At that time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. (Only persons who have formally requested notice of proposed regulatory actions from a specific rulemaking agency will be mailed copies of that specific agency's rulemaking notices.) Such public comments may lead the rulemaking agency to modify the proposed regulation.

If review of a duly-filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. (Gov. Code, sec. 11349.1.)

20. See also Welfare and Institutions Code section 19016, quoted in note 22.
21. California Regulatory Notice Register 91, No. 12-Z, March 22, 1991, p. 423.
22. Government Code section 11342, subdivision (a). See Government Code sections 11343, 11346 and 11347.5. See also Auto and Trailer Parks, 27 Ops.Cal.Atty.Gen. 56, 59 (1956). For a thorough discussion of the rationale for the "APA applies to all agencies" principle, see **1989 OAL Determination No. 4** (San Francisco Regional Water Quality Control Board and the State Water Resources Control Board, March 29, 1989, Docket No. 88-006), California Regulatory Notice Register 89, No. 16-Z, April 21, 1989, pp. 1026, 1051-1062; typewritten version, pp. 117-128.

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1989 OAL Determination No. 4 was upheld by the California Court of Appeal in State Water Resources Control Board v. Office of Administrative Law (Bay Planning Coalition) (1993) 12 Cal.App.4th 697, 16 Cal.Rptr.2d 25, rehearing denied, Feb. 19, 1993.

23. See Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746-747 (unless "expressly" or "specifically" exempted, all state agencies not in legislative or judicial branch must comply with rulemaking part of APA when engaged in quasi-legislative activities); Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 603.
24. Welfare and Institutions Code section 19016 provides:

"The department may prepare and promulgate regulations and statements of policy governing the protection of records and confidential information, the manner and form of filing applications, eligibility and investigation and determination thereof, for vocational rehabilitation services, procedure for fair hearings and such other regulations and policies as are found necessary to carry out the purposes of this division [Division 10 of the Welfare and Institutions Code]."

While there may be some "statements of policy" which are exempt from the provisions of the APA, it is not at all clear what they might be. In any case, it is clear that the challenged rule under discussion does not fall within any possible interpretation of the categories the cited statute lists.
25. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251.
26. The history note to Chapter 5 ("Administrative Adjudication," sections 11500 et seq.; emphasis added) of Title 2, Division 3, of the Government Code contained in West's annotated codes reveals that Chapter 5 was originally added under the heading "Administrative Procedure." (Emphasis added.) Thus, the

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word "procedure" as used in Government Code section 11342(b) would at a minimum appear to encompass the types of rules governing administrative adjudication (i.e. administrative hearings on such matters as license revocation) that are found in Chapter 5.

27. Supra, 219 Cal.App.3d at 438, 268 Cal.Rptr. at 253.
28. Roth v. Department of Veteran Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552. See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 323-324 (standard of general application applies to all members of any open class).
29. The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:
 - a. Rules relating only to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (b).)
 - b. Forms prescribed by a state agency or any instructions relating to the use of the form, except where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (b).)
 - c. Rules that "[establish] or [fix] rates, prices, or tariffs." (Gov. Code, sec. 11343, subd. (a)(1).)
 - d. Rules directed to a specifically named person or group of persons and which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)
 - e. Legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (b).)

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- f. There is weak authority for the proposition that contractual provisions previously agreed to by the complaining party may be exempt from the APA. City of San Joaquin v. State Board of Equalization (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest); see Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552 (dictum); Nadler v. California Veterans Board (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr. 546, 553 (same); but see Government Code section 11346 (no provision for non-statutory exceptions to APA requirements); see Del Mar Canning Co. v. Payne (1946) 29 Cal.2d 380, 384 (permittee's agreement to abide by the rules in application may be assumed to have been forced on him by agency as a condition required of all applicants for permits, and in any event should be construed as an agreement to abide by the lawful and valid rules of the commission); see International Association of Fire Fighters v. City of San Leandro (1986) 181 Cal.App.3d 179, 182, 226 Cal.Rptr. 238, 240 (contracting party not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed); see Perdue v. Crocker National Bank (1985) 38 Cal.3d 913, 926, 216 Cal.Rptr. 345, 353 ("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable). The most complete OAL analysis of the "contract defense" may be found in **1991 OAL Determination No. 6**, CRNR, 91, No. 43-Z, p. 1451, 1458, 1461; typewritten version, pp. 175-177. Like Grier v. Kizer, **1991 OAL Determination No. 6** rejected the idea that City of San Joaquin (cited above in this note) was still good law.

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Items a, b, and c, which are drawn from Government Code section 11342, subdivision (b), may also correctly be characterized as "exclusions" from the statutory definition of "regulation"--rather than as APA "exceptions." Whether or not these three statutory provisions are characterized as "exclusions," "exceptions," or "exemptions," it is nonetheless first necessary to determine whether or not the challenged agency rule meets the two-pronged "regulation" test: if an agency rule is either not (1) a "standard of general application" or (2) "adopted . . . to implement, interpret, or make specific the law enforced or administered by [the agency]," then there is no need to reach the question of whether the rule has been (a) "excluded" from the definition of "regulation" or (b) "exempted" or "excepted" from APA rulemaking requirements. Also, it is hoped that separately addressing the basic two-pronged definition of "regulation" makes for clearer and more logical analysis and will thus assist interested parties in determining whether or not other uncodified agency rules violate Government Code section 11347.5. In Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, review denied, the Court followed the above two-phase analysis.

The above is not intended as an exhaustive list of possible APA exceptions. Further information concerning general APA exceptions is contained in a number of previously issued OAL determinations. The annual Determinations Index is a helpful guide for locating such information. (See "Administrative Procedure Act" entry, "Exceptions to APA requirements" subheading.)

The Determinations Index, as well as an order form for purchasing copies of individual determinations, is available from OAL (Attn: Melvin Fong), 555 Capitol Mall, Suite 1290, Sacramento, CA 95814-4602, (916) 323-6225, CALNET 8-473-6225. The price of the latest version of the Index is available upon request. Two indexes are currently available. One covers calendar years 1986-88, the second covers 1989 and 1990. The 1991-1992 index should be available in mid-April 1993. Also, regulatory determinations are published in the California Regulatory Notice Register, which is available from OAL at an annual subscription rate of \$162.

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